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THE PROPOSED RIGHT OF APPEAL BY THE GOVERNMENT IN CRIMINAL CASES. — In this country, by the overwhelming weight of authorities, including the United States Supreme Court, it is held that the common law gives the state no right of appeal in criminal cases.[1] In the recent message to Congress, President Roosevelt called attention to the need of an enactment altering the present rule, and conferring upon the United States the right of appeal in criminal cases on questions of law. He points out incisely the power at present possessed by a single district judge to set at naught a congressional enactment believed by the vast majority of his colleagues to be valid; the danger of frequent conflicts, real or apparent, in the decisions of the various district or circuit courts, and the unfortunate results thereof; and the impossibility of the government's obtaining final and uniform rulings by recourse to a higher court. At the last session of Congress the House of Representatives, recognizing these evils, passed a bill allowing the United States "the same right of review by writ of error that is given to the defendant, including the right to a bill of exceptions: provided that . . . a verdict in favor of the defendant shall not be set aside."[2] The bill, entirely transformed, was unanimously reported by the Senate committee on judiciary.[3] As amended, it granted to the United States writs of error (and bills of exceptions) from decisions or judgments, "quashing or setting aside an indictment"; "sustaining a demurrer to an indictment or any count thereof"; "arresting a judgment of conviction for insufficiency of the indictment"; or "sustaining a special plea in bar when the defendant has not been put in jeopardy." Although little was said in opposition to this measure, it never reached a vote.

From a legal standpoint the proposed legislation seems likely to involve few seriously objectionable features. The enactment, however, should not

[1] United States *v.* Sanges, 144 U. S. 310, and cases cited. See also 8 HARV. L. REV. 354.

[2] See Congressional Record, 1st Session 59th Congress, 5408.

[3] See Congressional Record, 1st Session 59th Congress, 7589, 8695.

allow the government an appeal where it can have no effect on the fate of the defendant. It is unnecessary to consider whether or not such a provision would be unconstitutional; it is enough that bench and bar unite in condemning such proceedings, as productive of *ex parte* arguments and consequently poor decisions.[4] For this reason the House bill before mentioned seems ill-advised in providing that the government may appeal after a verdict of acquittal, but that the verdict shall not be set aside. Moreover, the enactment must not involve "double jeopardy" within the constitutional prohibition,[5] as construed by the United States Supreme Court. Under the rulings of this court jeopardy begins at the moment when the jury is empanelled and sworn,[6] at least "if the preliminary things of record are ready for the trial."[7] If there is a valid indictment and a jury sworn,[6] and also, it is held, if there is a defective indictment with a verdict of acquittal on the merits,[8] the accused has been in jeopardy. Conversely, no jeopardy is produced by preliminary proceedings such as a motion to quash or demurrer to the indictment;[9] and if after conviction the prisoner moves for arrest of judgment because of insufficiency of the indictment, his former jeopardy, if any, should be considered waived.[10] Under these doctrines of jeopardy, the Senate bill already cited seems particularly happy in granting the government an appeal in all those cases, and those only, where it may be allowed with legal and constitutional propriety. The seriousness of the evils existing at present, and the possibility of an entirely unobjectionable enactment of much remedial efficacy, seem to bespeak for the President the hearty support of the legal profession in his efforts to secure the timely passage of the recommended legislation.

POSTPONEMENT OF FUTURE GIFT "AS LONG AS LEGALLY POSSIBLE." — At common law no future interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest.[1] Courts have consistently refused to restrict the choice of lives to beneficiaries under the gift, or to limit the number which may be taken to measure its postponement.[2] Twenty-eight lives have been held not too many,[3] and the reason is given as Twisden put it: "All the candles are lighted at once."[4] The lives taken must not, however, be so numerous or so obscure as to preclude ascertainment by reasonable evidence at what time the survivor ceases to exist.[5] Thus a gift twenty-one years after the death

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[4] See Senator Spooner's remarks, Congressional Record, 1st Session 59th Congress, 9033. *Cf.* Wambaugh, Study of Cases, 2 ed., § 5.

[5] See U. S. Const., Fifth Amend.

[6] See Kepner *v.* United States, 195 U. S. 100, 128. See also 18 HARV. L. REV. 216.

[7] *Cf.* 1 Bish., Crim. L., 7 ed., § 1020.

[8] United States *v.* Ball, 163 U. S. 662. See also Kepner *v.* United States, *supra*, 130.

[9] See Kepner *v.* United States, *supra*, 130.

[10] United States *v.* Ball, *supra*, 672. *Cf.* Joy *v.* The State, 14 Ind. 139.

[1] Gray, Rule Perp., 2 ed., § 201.

[2] Thellusson *v.* Woodford, 4 Ves. 227.

[3] Cadell *v.* Palmer, 1 Cl. & F. 372. *Cf.* Humberston *v.* Humberston, 1 P. Wms. 332, where Lord Cowper decreed that an executory trust of a perpetuity be settled upon some fifty life-tenants and then over in tail.

[4] Love *v.* Windham, 1 Sid. 451.

[5] Gray, Rule Perp., 2 ed., § 217.